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Ooi Chieng Sim v Public Prosecutor

B HIGH COURT (PENANG) — CRIMINAL APPLICATION NO PA-44–12–05 OF 2021
MOHD RADZI ABDUL HAMID J
31 OCTOBER 2022

C *Constitutional Law — Legislation — Validity and constitutionality — Constitutionality, scope and application of Dangerous Drugs (Forfeiture of Property) Act 1988 ('FOPA') — Applicant charged under s 4(1) of FOPA — Whether prayers sought by applicant were frivolous and abuse of court process — Whether FOPA was unconstitutional — Whether charges were tainted with*
D *mala fides and abuse of process of court — Whether charges were nullity — Whether there was failure to prove predicate offence — Whether seizure of properties were disproportionate to offence under s 12(2) of Dangerous Drugs Act 1952 — Whether reference/inquiry proceedings under s 32(2) of FOPA were legal — Courts of Judicature Act 1964 ss 30 & 84 — Dangerous Drugs (Forfeiture of*
E *Property) Act 1988 ss 4(1) & 32(2) — Federal Constitution art 149*

The applicant was charged together with seven others for an offence under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') for allegedly having trafficked in 4,980g of syabu ('the first charge'). During this time the applicant
F was also detained under s 3(1) of the Dangerous Drugs (Special Preventive Measures Act) 1985 ('the DDSPM') for a period of 60 days. The first charge was then amended to one for a lesser offence under s 12(2) of the DDA ('amended charge'). The applicant and the seven others were then charged for the possession of only 2.66g of methamphetamine. Since s 41B of the DDA
G that prohibited bail under certain cases did not apply to an offence under s 12(2) of the DDA, the applicant was entitled to remain free pending the disposal of the trial under the amended charge subject to bail. Despite the granting of bail by the magistrate, the applicant was re-arrested under s 3(1) of the DDSPM. The detention was to expire on 3 October 2020 but one day
H before the date, the applicant was additionally charged under s 4(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the FOPA') at the Butterworth sessions court ('FOPA charges'). Because of the FOPA charges, the applicant was not entitled to bail. From the time the applicant was first arrested on 16 January 2020, the applicant's business interest and assets had
I been subjected to various actions including suspension of the applicant's public listed companies by the Securities Commission and seizure of assets by the authorities not only belonging to the applicant but also those belonging to the applicant's wife and his companies ('the seized properties'). The applicant, his wife and his company filed their respective claims that they were legally entitled

to the seized properties. The claims were then referred by the prosecution to the sessions court under s 32(2) of the FOPA at the Georgetown sessions court ('s 32 proceedings'). Thus, this application in encl 1 seeking to: (a) determine certain questions as to the constitutionality, scope and application of the FOPA; and (b) access the court's jurisdiction to quash and set aside: (i) the FOPA charges; and (ii) the s 32 proceedings ('sessions court proceedings'). The respondent raised preliminary objections to the application premised on the following: (1) non-compliance with ss 30 and 84 of the Courts of Judicature Act 1964 ('the CJA'); (2) there were no substantive proceedings before the court from which the constitutional questions arose; (3) the commencement of the application was premature and speculative; and (4) the prayers sought for by the applicant were frivolous and an abuse of court process.

Held:

(1) Since the application included the prayers for the quashing and setting aside of the sessions court proceedings the application could not have been filed in the sessions court since the sessions court was devoid of the power to make any order to set aside and quash a charge or proceeding. The relief sought by the applicant could only be brought to the High Court for the exercise of its powers of inherent jurisdiction. The notice of motion constituted sufficient substantive proceeding before the court. The constitutional questions had a direct bearing on the issue of legality of the sessions court proceedings and the consideration of whether the court would have the basis to quash and set aside the sessions court proceedings. Whilst s 30 of the CJA was specific on the procedures applicable where constitutional questions were raised in a proceeding in a subordinate court, it was not a provision that must be mandatorily employed in every case where constitutional issues arose. There was no objection to the applicant choosing not to file an application under s 30 of the CJA but instead filing directly at the High Court the constitutional questions coupled with the prayers to set aside and quash the sessions court proceedings. Hence, the notice of motion was not frivolous and not an abuse of process of the court. The preliminary objections raised by the respondent were therefore rejected (see paras 21–23, 26 & 28).

(2) Preventive detention law or a law containing provisions on preventive detention was only a type of law that could be passed by Parliament inconsistent with arts 5, 9, 10 and 13 of the Federal Constitution ('the FC') but not necessarily the only type of law. Any law promulgated pursuant to art 149 of the FC must not necessarily be a legislation substantively and dominantly dealing with preventive detention. The FOPA was just a specie of the genus of security laws apart from preventive detention promulgated pursuant to art 149 of the FC. The FOPA was constitutional notwithstanding that it had no provision relating to preventive detention. The phrase 'to stop or prevent' in art 149 of the FC

must be read in the context of the relevant law passed. In relation to the FOPA, that phrase essentially carried the meaning to stop or prevent drug related crimes by seizing and forfeiting illegal property used in the commission of or derived from such crimes. Article 151 of the FC had no relevance where the law passed did not contain provisions on preventive detention. Since each of the question had been answered affirmatively in favour of the constitutionality of the FOPA, there was no effect on the applicant and the sessions court proceedings as far as the constitutionality of the law under which he faced action was concerned (see paras 43, 47 & 55).

(3) Whilst on the face of the narrative presented by the applicant there seemed to be reasons for concern on the proportionality of the actions taken against the applicant weighed against the small amount of drug the applicant was charged for possessing under the amended charge, these matters could not be summarily determined merely based on affidavits. There was a presumption under s 114(e) of the Evidence Act 1950 that the actions taken by public authorities were made within the law. Therefore, there was a presumption that in charging the applicant initially under the first charge and then under the amended charge, his detention and then charging him under the FOPA charges, the authorities had acted regularly in accordance with the law. There was also a presumption that the decision of the prosecution in filing the charges against the applicant was legal and constitutional. All averments made by the applicant did not in themselves amounted to prima facie and compelling evidence of any mala fides that justified a quashing and setting aside of the sessions courts proceedings. The respondent's denials were sufficient under the circumstances to dispute the applicant's claims of mala fides. The allegation of extortion on the applicant allegedly made by some police officers on behalf of certain unnamed senior officials and the delays by the police in concluding its investigation on the matter must not necessarily lend credence to the applicant's claims of mala fides (see paras 57 & 60–62).

(4) It could not be an ingredient of an offence under s 4(1) of the FOPA that an accused had acted as part of a substantial body of persons because such ingredient would be subject to proof and to prove that fact would simply be too onerous on the prosecution and ultimately no one could practically be charged under that law. To state that the Preamble of the FOPA must be read into s 4(1) thus making it an ingredient of the offence would result in a legal quagmire that could not have been intended by the legislators. The manner s 4(1) of the FOPA was drafted showed that the offence was not predicated on a fact that the accused had committed the offence whilst being part of a body of substantial body of persons (see para 71).

(5) There was a very fundamental difference between the actions brought under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA') and s 4(1) of the FOPA. It would be inaccurate to state that the FOPA charges were a nullity because they did not disclose the predicate offence. The proof of a criminal offence beyond a reasonable doubt could not stand on the same footing as proving a predicate offence for a civil forfeiture action under s 56(1) of the AMLATFA which was on a balance of probabilities. The proof of a criminal offence involved proving the ingredients of the offence through credible evidence during the trial. To demand that the prosecution prove first that the seized properties were illegal before the FOPA charges could be instituted was to separate and subject the proof of the ingredients of the offence at different stages of the criminal proceedings, that was one before the charge was proffered and the other ingredients at the trial. That could not be a correct proposition of the law in drafting a charge and proving the elements of an offence. To suggest that was to confuse the difference between those two types of proceedings (see paras 74 & 76).

(6) The consideration of the principle of proportionality of forfeiture arose only after the predicate offence was proven (as under the AMLFTA) or following conviction of an offence. Therefore, it was premature to raise the issue of proportionality at this stage when the amended charge, the FOPA charges and s 32 proceedings were still pending. The issue could be raised by the applicant in those proceedings at the appropriate time (see paras 78–79).

(7) Since the FOPA charges were still pending, the applicant squarely fell within the scope of s 7(3) of the FOPA. Although the applicant was a liable person because of his detention, events had superseded that detention when the applicant was charged with the FOPA charges. As a result of that, the applicant's position as a liable person under s 7(1) of the FOPA had changed from one who was just detained to one who was facing prosecution proceedings under the FOPA charges which were still pending. There had not been a selective persecution by the prosecution and an abuse of process of court when the applicant's claim was referred to the sessions court. The s 32 proceedings were further stayed until disposal of the appeal (see paras 81–82 & 86).

[Bahasa Malaysia summary

Pemohon dituduh bersama tujuh yang lain atas kesalahan di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB') kerana didakwa mengedar 4,980g syabu ('pertuduhan pertama'). Pada masa ini pemohon juga telah ditahan di bawah s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('LLPK') untuk tempoh 60 hari. Pertuduhan pertama kemudiannya dipinda kepada satu bagi kesalahan yang lebih ringan di bawah s 12(2) ADB

('pertuduhan terpinda'). Pemohon dan tujuh yang lain kemudiannya dituduh memiliki hanya 2.66g methamphetamine. Memandangkan s 41B ADB yang melarang ikat jamin di bawah kes-kes tertentu tidak terpakai bagi kesalahan di bawah s 12(2) ADB, pemohon berhak untuk kekal bebas sementara menunggu pelupusan perbicaraan di bawah pertuduhan terpinda tertakluk kepada jaminan. Walaupun dibenarkan ikat jamin oleh majistret, pemohon telah ditahan semula di bawah s 3(1) LLPK. Penahanan itu akan tamat pada 3 Oktober 2020 tetapi sehari sebelum tarikh itu, pemohon juga dituduh di bawah s 4(1) Akta Dadah Berbahaya (Pelucuthakan Harta) 1988 ('ADBPH') di mahkamah sesyen Butterworth ('pertuduhan ADBPH'). Disebabkan pertuduhan ADBPH, pemohon tidak berhak untuk diikat jamin. Sejak pemohon pertama kali ditangkap pada 16 Januari 2020, kepentingan perniagaan dan aset pemohon telah dikenakan pelbagai tindakan termasuk penggantungan syarikat senarai awam pemohon oleh Suruhanjaya Sekuriti dan rampasan aset oleh pihak berkuasa bukan sahaja milik pemohon tetapi juga milik isteri pemohon dan syarikatnya ('harta benda yang disita'). Pemohon, isterinya dan syarikatnya memfailkan tuntutan masing-masing bahawa mereka berhak secara sah ke atas harta yang disita itu. Tuntutan itu kemudiannya dirujuk oleh pihak pendakwaan ke mahkamah sesyen di bawah s 32(2) ADBPH di mahkamah sesyen Georgetown ('prosiding s 32'). Oleh itu, permohonan ini dalam lampiran 1 bertujuan untuk: (a) menentukan persoalan tertentu tentang keperlembagaan, skop dan pemakaian ADBPH; dan (b) mengakses bidang kuasa mahkamah untuk membatalkan dan mengetepikan: (i) pertuduhan ADBPH; dan (ii) prosiding s 32 ('prosiding mahkamah sesyen'). Responden membangkitkan bantahan awal terhadap permohonan berdasarkan perkara berikut: (1) ketidakpatuhan ss 30 dan 84 Akta Mahkamah Kehakiman 1964 ('AMK'); (2) tiada prosiding substantif di hadapan mahkamah yang daripadanya timbul persoalan perlembagaan; (3) permulaan permohonan adalah pramatang dan spekulatif; dan (4) permohonan yang dipohon oleh pemohon adalah remeh dan menyalahgunakan proses mahkamah.

Diputuskan

(1) Memandangkan permohonan itu termasuk permohonan untuk membatalkan dan mengetepikan prosiding mahkamah sesyen, permohonan itu tidak boleh difailkan di mahkamah sesyen kerana mahkamah sesyen tidak mempunyai kuasa untuk membuat apa-apa perintah untuk mengetepikan dan membatalkan pertuduhan atau prosiding. Relif yang dipohon oleh pemohon hanya boleh dibawa ke Mahkamah Tinggi untuk melaksanakan kuasa bidang kuasa yang wujud. Notis usul itu merupakan prosiding substantif yang mencukupi di hadapan mahkamah. Persoalan perlembagaan mempunyai kaitan langsung dengan isu kesahihan prosiding mahkamah sesyen dan pertimbangan sama ada mahkamah mempunyai asas untuk

membatalkan dan mengetepikan prosiding mahkamah sesyen. Walaupun s 30 AMK adalah khusus mengenai prosedur yang terpakai di mana persoalan perlembagaan dibangkitkan dalam prosiding di mahkamah bawahan, ia bukanlah satu peruntukan yang mesti digunakan secara mandatori dalam setiap kes di mana isu perlembagaan timbul. Tiada bantahan terhadap pemohon memilih untuk tidak memfailkan permohonan di bawah s 30 AMK tetapi sebaliknya memfailkan terus di Mahkamah Tinggi soalan perlembagaan ditambah dengan permohonan untuk mengetepikan dan membatalkan prosiding mahkamah sesyen. Oleh itu, notis usul itu tidak remeh dan bukan penyalahgunaan proses mahkamah. Oleh itu, bantahan awal yang dikemukakan oleh responden telah ditolak (lihat perenggan 21–23, 26 & 28).

(2) Undang-undang tahanan pencegahan atau undang-undang yang mengandungi peruntukan mengenai tahanan pencegahan hanyalah sejenis undang-undang yang boleh diluluskan oleh Parlimen yang tidak selaras dengan perkara 5, 9, 10 dan 13 Perlembagaan Persekutuan ('PP') tetapi tidak semestinya satu-satunya jenis undang-undang. Mana-mana undang-undang yang diisytiharkan menurut perkara 149 PP tidak semestinya merupakan undang-undang yang secara substantif dan dominan berurusan dengan penahanan pencegahan. ADBPH hanyalah sejenis undang-undang keselamatan selain daripada tahanan pencegahan yang diisytiharkan menurut perkara 149 PP. ADBPH adalah berperlembagaan walaupun ia tidak mempunyai peruntukan berkaitan tahanan pencegahan. Frasa 'untuk memberhentikan atau mencegah' dalam perkara 149 PP mesti dibaca dalam konteks undang-undang berkaitan yang diluluskan. Berhubung dengan ADBPH, frasa itu pada dasarnya membawa maksud untuk memberhentikan atau mencegah jenayah berkaitan dadah dengan merampas dan menyita harta haram yang digunakan dalam melakukan perbuatan atau diperoleh daripada jenayah tersebut. perkara 151 PP tidak mempunyai kaitan apabila undang-undang yang diluluskan tidak mengandungi peruntukan mengenai tahanan pencegahan. Memandangkan setiap soalan telah dijawab secara afirmatif yang memihak kepada keperlembagaan ADBPH, tiada kesan ke atas pemohon dan prosiding mahkamah sesyen setakat perlembagaan undang-undang yang mana tindakan berkaitan dihadapi olehnya (lihat perenggan 43, 47 & 55).

(3) Walaupun pada muka naratif yang dikemukakan oleh pemohon nampaknya terdapat sebab-sebab untuk kebimbangan mengenai kepadanan tindakan yang diambil terhadap pemohon ditimbang dengan jumlah kecil dadah yang didakwa oleh pemohon kerana memiliki di bawah pertuduhan terpinda, perkara ini tidak boleh ditentukan secara ringkas hanya berdasarkan afidavit. Terdapat anggapan di bawah s 114(e) Akta Keterangan 1950 bahawa tindakan yang diambil oleh pihak

berkuasa awam dibuat mengikut undang-undang. Oleh itu, terdapat anggapan bahawa dalam mendakwa pemohon pada mulanya di bawah pertuduhan pertama dan kemudian di bawah pertuduhan terpinda, penahanannya dan kemudiannya didakwa di bawah pertuduhan ADBPH, pihak berkuasa telah bertindak secara betul mengikut undang-undang. Terdapat juga anggapan bahawa keputusan pihak pendakwaan dalam memfailkan pertuduhan terhadap pemohon adalah sah dan mengikut perlembagaan. Semua dakwaan yang dibuat oleh pemohon dengan sendirinya tidak merupakan bukti prima facie dan meyakinkan tentang sebarang mala fide yang mewajarkan pembatalan dan mengetepikan prosiding mahkamah sesyen. Penafian responden adalah mencukupi di bawah keadaan untuk mempertikaikan tuntutan mala fide pemohon. Dakwaan ugutan ke atas pemohon yang didakwa dibuat oleh beberapa pegawai polis bagi pihak pegawai kanan tertentu yang tidak dinamakan dan kelewatan polis dalam menyelesaikan siasatannya mengenai perkara itu tidak semestinya memberi kepercayaan kepada tuntutan mala fide pemohon (lihat perenggan 57 & 60–62).

(4) Ia tidak boleh menjadi elemen kesalahan di bawah s 4(1) ADBPH bahawa seseorang tertuduh telah bertindak sebagai sebahagian daripada sekumpulan besar orang kerana elemen tersebut akan tertakluk kepada bukti dan untuk membuktikan fakta itu hanya akan terlalu membebankan pihak pendakwaan dan akhirnya tiada sesiapa pun boleh didakwa di bawah undang-undang itu. Untuk menyatakan bahawa mukadimah ADBPH mesti dibaca ke dalam s 4(1) sekali gus menjadikannya sebagai elemen kesalahan akan mengakibatkan kekacauan undang-undang yang tidak mungkin dimaksudkan oleh penggubal undang-undang. Cara s 4(1) ADBPH digubal menunjukkan bahawa kesalahan itu tidak berdasarkan fakta bahawa tertuduh telah melakukan kesalahan itu semasa menjadi sebahagian daripada sekumpulan orang (lihat perenggan 71).

(5) Terdapat perbezaan asas antara tindakan yang dibawa di bawah Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('APPWH') dan s 4(1) ADBPH. Adalah tidak tepat untuk menyatakan bahawa pertuduhan ADBPH adalah terbatal kerana ia tidak mendedahkan kesalahan predikat. Bukti kesalahan jenayah melampaui keraguan munasabah tidak boleh berdiri di atas landasan yang sama seperti membuktikan kesalahan predikat untuk tindakan pelucuthakan sivil di bawah s 56(1) APPWH yang berada pada imbangan kebarangkalian. Pembuktian kesalahan jenayah melibatkan pembuktian elemen kesalahan melalui keterangan yang boleh dipercayai semasa perbicaraan. Untuk menuntut supaya pihak pendakwaan membuktikan terlebih dahulu bahawa harta yang disita adalah menyalahi undang-undang sebelum pertuduhan ADBPH boleh dimulakan adalah mengasingkan

dan mengemukakan bukti elemen kesalahan itu pada peringkat prosiding jenayah yang berbeza, iaitu satu sebelum pertuduhan dikemukakan dan elemen lain pada perbicaraan. Ia tidak boleh menjadi cadangan undang-undang yang betul dalam merangka pertuduhan dan membuktikan elemen kesalahan. Untuk mencadangkannya adalah mengelirukan perbezaan antara kedua-dua jenis prosiding tersebut (lihat perenggan 74 & 76).

(6) Pertimbangan prinsip berpadanan pelucuthakan timbul hanya selepas kesalahan predikat dibuktikan (seperti di bawah AMLFTA) atau berikutan sabitan kesalahan. Oleh itu, adalah terlalu awal untuk membangkitkan isu kepadanan pada peringkat ini apabila pertuduhan pindaan, pertuduhan ADBPH dan prosiding s 32 masih belum selesai. Isu itu boleh dibangkitkan oleh pemohon dalam prosiding tersebut pada masa yang sesuai (lihat perenggan 78–79).

(7) Memandangkan pertuduhan ADBPH masih belum selesai, pemohon berada dalam skop s 7(3) ADBPH. Walaupun pemohon adalah orang yang bertanggungjawab kerana penahanannya, peristiwa telah menggantikan penahanan itu apabila pemohon didakwa dengan pertuduhan ADBPH. Akibat daripada itu, kedudukan pemohon sebagai orang yang bertanggungjawab di bawah s 7(1) ADBPH telah berubah daripada seorang yang baru ditahan kepada seorang yang sedang menghadapi prosiding pendakwaan di bawah pertuduhan ADBPH yang masih belum selesai. Tidak ada penganiayaan terpilih oleh pihak pendakwaan dan penyalahgunaan proses mahkamah apabila tuntutan pemohon dirujuk ke mahkamah sesyen. Prosiding s 32 telah ditangguhkan sehingga rayuan dilupuskan (lihat perenggan 81–82 & 86).]

Cases referred to

A Chandra Segaran a/l Anggapan v Timbalan Menteri Dalam Negeri Malaysia [2002] MLJU 101, HC (refd)

Ahmad Yani bin Ismail v Inspektor General of Police & Ors [2005] 4 MLJ 636; [2004] 1 LNS 224, HC (refd)

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831, FC (refd)

Ahmad Zubair Hj Murshid v PP [2014] 1 MLJ 624; [2014] 1 CLJ 697, CA (refd)

Amfinance Bhd v PP [2010] 7 CLJ 607 (refd)

Che Ibrahim b Che Ismail v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [2001] MLJU 572, HC (refd)

Chew Wai Keong v PP [2010] 6 MLJ 847, HC (refd)

Dato' Menteri Othman Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29; [1984] 1 CLJ Rep 98, FC (refd)

A *Dato' Seri Anwar Ibrahim v PP* [2010] 6 MLJ 533; [2010] 8 CLJ 934, CA (refd)
Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2022] 1 MLJ 1; [2020] 3 CLJ 593, FC (folld)
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B CLJ 511, FC (refd)
Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356; [2022] 5 CLJ 1, FC (refd)
Gan Boon Ann v PP [2016] MLJ 265, FC (refd)
Haris Fathillah bin Mohd Ibrahim lwn Pendakwa Raya [2015] MLJU
C 874; [2016] 1 LNS 680, CA (refd)
Hong Leong Bank Bhd v PP [2009] 3 MLJ 546; [2009] 8 CLJ 463, HC (refd)
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D *Karpal Singh & Anor v PP* [1991] 2 MLJ 544, SC (refd)
Kosma Palm Oil Mills Sdn Bhd v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)
Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (refd)
E *Merck KGaA v Leno Marketing (M) Sdn Bhd (Registrar of Trade Marks, interested party)* [2018] 5 MLJ 1; [2018] 6 CLJ 167, FC (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara and other appeals [2022] 4 MLJ 449; [2002] 4 CLJ 309, FC (refd)
Mohamad Ibrahim Kamarudin v Timbalan Menteri Dalam Negeri dan lain lain
F [2018] MLJU 67; [2018] 1 LNS 59, HC (consd)
Mohd Fahmi Redza bin Mohd Zarin v Pendakwa Raya [2017] MLJU 516; [2017] 1 LNS 683, HC (not folld)
Mohd Rafizi Ramli v PP [2014] 3 MLJ 114; [2014] 4 CLJ 1, CA (refd)
PP v Billion Nova Sdn Bhd [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)
G *PP v Kuala Dimensi Sdn Bhd* [2021] 2 MLJ 469; [2021] 3 CLJ 198, FC (refd)
PP v Lau Kee Hoo [1983] 1 MLJ 157; [1983] 1 CLJ 21, FC (refd)
PP v Multi Electrical Supply & Services [2022] 10 MLJ 369; [2022] 5 CLJ 113, HC (refd)
PP v Sudesh Ratnarajah & Ors [2021] 4 MLJ 607; [2021] 6 CLJ 333, CA
H (refd)
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Selva Vinayagam Sures v Timbalan Menteri Dalam Negeri, Malaysia [2021] 1 MLJ 601; [2021] 2 CLJ 29, FC (distd)
I *Siow Chung Peng v PP* [2014] 4 MLJ 504; [2014] 6 CLJ 423, FC (refd)
State (Trimbole) v Governor of Mountjoy [1985] (IR) 550 (not folld)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (distd)
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Teh Cheng Poh v PP [1979] 1 MLJ 50; [1978] 1 LNS 202, PC (refd)
Teo Chee Kong v PP [2022] 2 MLJ 328; [2021] 8 CLJ 29, CA (refd)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 293; [1988] 1 LNS 132, SC (refd)
Wee Choo Keong v Lee Chong Meng & Anor [1996] 3 MLJ 41; [1996] 3 CLJ 508, CA (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 56(1)
Courts of Judicature Act 1967 ss 25, 30, 31, 35, 84, 84(1)
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 6(1)
Dangerous Drugs Act 1952 ss 12(2), 39B(1), 41B
Evidence Act 1950 s 114(e)
Dangerous Drugs Act (Forfeiture of Property) 1988 ss 2, 3, 4, 4(1), 7, 7(1), (3), 8, 32, 32(2), 57, Part III
Federal Constitution arts 5, 5(1), 9, 10, 13, 149, 149(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), 151, 151(1), Part III
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012)
Interpretations Acts 1948 and 1967 s 15
Penal Code ss 34, 102A, 107
Prevention of Crime Act 1959
Prevention of Terrorism Act 2015
Security Offences (Special Measures) Act 2012

Muhammad Shafee bin Abdullah (with Wee Yeong Kang) (Shafee & Co) for the applicant.
Khairul Anuar bin Abdul Halim (with Amril bin Johari and Yazid Mustaqim bin Roslan) (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the respondent.

Mohd Radzi J:

INTRODUCTION

[1] This is a decision of this court with respect to the applicant's application in encl 1 ('application').

[2] The applicant seeks to: (a) determine certain questions as to the constitutionality, scope and application of the Dangerous Drugs Act

(Forfeiture of Property) 1988 ('the FOPA') as set out in Annexure A of encl 1; and (b) access this court's inherent jurisdiction to quash and set aside:

(a) the charges against the applicant under s 4(1) of the Dangerous Drugs Act (Forfeiture of Property) 1988 ('the FOPA') in cases PB-62D-399–10 of 2020 and PB-62D-340–10 of 2020 at the Butterworth Sessions Court ('FOPA charges'); and

(b) the reference/inquiry proceedings under s 32(2) of the FOPA in cases PA-64FOP-22–04 of 2020, PA-64FOP-40–08 of 2020 and PA-64FOP-67–11 of 2020 at the Georgetown Sessions Court ('s 32 proceedings').

[3] The FOPA charges and s 32 proceedings are collectively referred to as the 'session court proceedings'.

AFFIDAVITS

[4] The application is supported by affidavits of Ooi Chieng Sim as in encls 2, 12 and 15.

[5] In response the respondent filed affidavits in reply appearing in encls 5 (Khairul Anuar bin Abdul Halim, Deputy Public Prosecutor), 6 (Inspector Nur Syahirah bt Safri), 7 and 10 (ASP Norhasnizam bin Hamzah), 8 (Insp Lee Kian Hoo) and 9 and 13 (ASP Linkeswaran a/l Kanapathy).

BACKGROUND FACTS

[6] It would be necessary to set out in summary the background facts that brought about this application. Following two separate operations by the Royal Malaysia Police called 'Ops Eagle Diamond' and 'Ops Eagle' the applicant was arrested together with seven others on 16 January 2020 on suspicion of being involved in drugs trafficking. On 30 January 2020 they were charged for an offence under s 39B(1) of the Dangerous Drugs Act 1952 ('the DDA') for allegedly having trafficked in 4,980g of *syabu* ('first charge'). During this time the applicant was also detained under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the DDSPM') for a period of 60 days.

[7] On 3 August 2020 the first charge was amended to one for a lesser offence under s 12(2) of the DDA after the seizure of substances suspected to contain *syabu* under the first charge turned out to contain no such drug nor any other dangerous drug ('amended charge'). The applicant and the seven others were then charged for the possession of only 2.66g methamphetamine. This substance was not part of the substance that was seized under the first charge but was found elsewhere although still within the same premises where the

suspected *syabu* was seized under the first charge. The applicant pleaded not guilty and claimed trial.

[8] Since s 41B of the DDA that prohibits bail under certain cases do not apply to an offence under s 12(2) of the DDA, the applicant was entitled to remain free pending disposal of the trial under the amended charge subject to bail. Despite the granting of bail by the magistrate, the applicant was re-arrested under s 3(1) of the DDSPM on 5 August 2020. That detention was to expire on 3 October 2020.

[9] Short of one day before 3 October 2020, the applicant was then additionally charged for the FOPA charges. Because of the FOPA charges, the applicant was not entitled to bail as provided under s 57 of the same Act. As a result of those FOPA charges, the applicant remains an incarcerated man to this day.

[10] Additionally, from the time the applicant was first arrested on 16 January 2020, the applicant's business interest and assets had been subject to various actions including suspension of the applicant's public listed companies by the Securities Commission and seizure by the authorities assets not only belonging to the applicant but also those belonging to the applicant's wife and his companies ('seized properties').

[11] Between 18 February 2020 to 10 March 2020 the applicant, his wife and his company filed their respective claims that they are legally entitled to the seized properties. The claims were then referred by the prosecution to the sessions court under the s 32 proceedings.

[12] Thus, the application was filed to secure the applicant's liberty and release of the seized properties.

APPLICANT'S APPROACH UNDER THE APPLICATION

[13] The application is based on two broad grounds. They are:

(a) by questioning the constitutionality of the FOPA as a legislation promulgated pursuant to art 149 of the Federal Constitution ('the FC'); and

(b) by challenging the legality of the FOPA charges and s 32 proceedings.

PRELIMINARY OBJECTIONS

[14] At the outset of the hearing of this application the respondent raised certain preliminary objections to the application. These preliminary objects are

premised on the following issues: (a) non-compliance with ss 30 and 84 of the Courts of Judicature Act ('the CJA'); (b) there are no substantive proceedings before this court from which the constitutional questions arose; (c) the commencement of this application is premature and speculative; and (d) that the prayers sought for by the applicant are frivolous and an abuse of process of this court.

ARGUMENTS BY PARTIES

By the respondent

[15] In arguing for the preliminary objections learned deputy public prosecutor counsel submitted that:

(a) the constitutional questions raised by the applicant should have been raised at the sessions court since these questions relate to the sessions court proceedings. Only when they are raised at the sessions court shall these questions be referred to the High Court by the sessions court judge via the operation of s 30 of the CJA;

(b) in support of that submission references were made to the Court of Appeal decision in *Haris Fathillah bin Mohd Ibrahim lwn Pendakwa Raya* [2015] MLJU 874; [2016] 1 LNS 680 and the High Court decision in *Mohd Fahmi Redza bin Mohd Zarin v Pendakwa Raya* [2017] MLJU 516; [2017] 1 LNS 683;

(c) it was also argued that based on the decision of the Court of Appeal in *Teo Chee Kong v Public Prosecutor* [2022] 2 MLJ 328; [2021] 8 CLJ 29 where s 30 of the CJA is applicable then the referral of constitutional issues must originate from the sessions court and not filed directly at the High Court;

(d) learned deputy public prosecutor further contended that the substantive proceedings from which the constitutional questions arose are before the sessions court and not the High Court. It was contended that the filing of the notice of motion cannot amount to a substantive proceedings before the High Court as the facts of dispute or controversy is not before the High Court. There being no substantive proceedings before this court, s 84(1) of the CJA has not been satisfied;

(e) to support that contention, learned deputy public prosecutor referred to the decisions of the Federal Court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1; [2020] 3 CLJ 593 and the Court of Appeal in *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41; [1996] 3 CLJ 508;

(f) learned deputy public prosecutor additionally submitted that the prayers sought by the applicant in encl 1 were confusing and speculative

as they rested on the use of different routes to reach different results. On one hand the applicant sought to refer constitutional questions to the Federal Court under s 84 of the CJA whilst on the other hand the applicant sought to quash and set aside the sessions court proceedings through the exercise of the High Court powers of supervision and revision under ss 25, 31 and 35 of the CJA; and

(g) thus, the applicant's endeavor at seeking alternative reliefs or remedies in the alternatives in the same application is speculative and abuse of the process of court.

By the applicant

[16] In his counter argument learned counsel for the applicant submitted, inter alia, as follows:

(a) following the decision of the Federal Court in *Gan Boon Ann v Public Prosecutor* [2016] MLJ 265, this court should refer the constitutional questions to the Federal Court;

(b) the substantive proceeding before this court is the very notice motion itself. Notwithstanding that the sessions court proceedings are still pending, the applicant has brought to this court the constitutional issues that have a direct effect on the applicant in those proceedings. The prayers to quash and set aside the sessions court proceedings is the dispute. The decision of the Federal Court in *Datuk Seri Anwar Ibrahim* as referred by the respondent must be distinguished on the grounds that the applicant in that case did not prove how he was affected by the constitutional issues and therefore as correctly decided by the Federal Court, the questions posed were academic and speculative;

(c) that the application is made by reading together ss 31, 35 and 84 of the CJA together with the inherent jurisdiction of this court to hear the application by way of the supervisory and revisionary powers of this court. Only through the exercise of the revisionary and supervisory powers can this court exercise the powers to quash and set aside the sessions court proceedings in the event this court decides to determine the constitutional questions and the questions are answered in favor of the applicant;

(d) reference was made to the High Court decision in *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; [1979] 1 LNS 36 where the High Court had exercised its supervisory powers in directing that the sessions court proceed with trial of four charges jointly;

(e) since the power to issue an order of certiorari to quash and set aside a charge rests only with the High Court then the application made by the applicant is not misplaced. To support this contention learned counsel

for the applicant referred to the Federal Court decision in *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101; [2007] 1 CLJ 565 where it was held and later referred to with approval in another Federal Court decision in *Merck KGaA v Leno Marketing (M) Sdn Bhd (Registrar of Trade Marks, interested party)* [2018] 5 MLJ 1; [2018] 6 CLJ 167 that the powers of revision and supervision of the High Court under s 35 of the CJA are distinct and that the powers to issue a certiorari order comes under the supervisory powers of the High Court;

(f) since the power to quash any charge without hearing any evidence in support only rests with the inherent jurisdiction of the High Court and not the sessions court as per the Federal Court decision in *Siow Chung Peng v Public Prosecutor* [2014] 4 MLJ 504; [2014] 6 CLJ 423, then this application was correctly framed and filed before this court; and

(g) learned counsel for the applicant further submitted that the application will expeditiously dispose of all the sessions court proceedings as any decision of the Federal Court or by this court on the constitutional questions will affect all the sessions court proceedings at the same time. A decision to quash and set aside the charges against the applicant or any supervisory order can then be made by a single order of this court. This will avoid the unnecessary and multiple steps of having to raise the constitutional questions repeatedly before the different sessions courts leading to duplicity of references under s 30 of the CJA by the Butterworth and Georgetown Sessions Courts.

RULING ON PRELIMINARY OBJECTIONS

[17] After hearing the submissions by learned counsel for the applicant and learned deputy public prosecutor for the respondent this court decided as follows.

[18] Referring to s 84 of the CJA and guided by the majority decision of the Federal Court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor*, one of the conditions that this court must satisfy in exercising its powers under s 84 of the CJA is that the questions referred to must arise in any proceedings before the High Court.

[19] It is clear that in making this application, the applicant had chosen to not take the route under s 30 of the CJA to raise the constitutional questions before the sessions court first and wait for the same to be remitted to the High Court but instead chose to present the constitutional questions directly to the High Court coupled with the prayer to set aside or quash the sessions court proceedings.

[20] In this court's view, had the constitutional questions been posed to this court without the prayers to set aside or quash the sessions court proceedings, this court would agree with the respondent that the applicant cannot move this court under s 84 of the CJA to hear the application since there is no proceedings or dispute affecting the applicant before the High Court. In such a case, the applicant would have been compelled to comply with s 30 of the CJA and raise the constitutional questions before the sessions court first.

[21] Since the application included the prayers for the quashing and setting aside of the sessions court proceedings the application could not have been filed in the sessions court since the sessions court is devoid of the power to make any order to set aside and quash a charge or proceeding. That being the situation, the relief sought by the applicant can only be brought to the High Court for the exercise of its powers of inherent jurisdiction. Thus, in this court's view the notice of motion constitutes sufficient substantive proceeding before this court.

[22] With reference to the Court of Appeal decision in *Wee Choo Keong v Lee Chong Meng & Anor*, this court found that the constitutional questions have a direct bearing on the issue of legality of the sessions court proceedings and the consideration of whether this court will have the basis to quash and set aside the sessions court proceedings.

[23] This court did not find the decision in *Haris Fathillah bin Mohd Ibrahim lawan Pendakwa Raya* referred to by the learned deputy public prosecutor as being persuasive in supporting the preliminary objections. It is this court's view whilst s 30 of the CJA is specific on the procedures applicable where constitutional questions are raised in a proceedings in a subordinate court, it is not a provision that must be mandatorily employed in every case where constitutional issues arise.

[24] Where the constitutional questions are posed absent of any application to set aside or quash a charge then s 30 of the CJA must be applied. In other instances where the constitutional questions are raised as the basis to set aside or quash a charge then the accused has the option to refer such questions directly to the High Court via a notice of motion as done in the present application.

[25] As shown by the facts in *Teo Chee Kong v Public Prosecutor*, the accused filed an application at the High Court to set aside charges against him in the sessions court and also filed an application in the sessions court to refer ten constitutional questions under s 30 of the CJA. The accused then withdrew the application at the sessions court after agreeing with the High Court judge that there could be a duplicity of the applications by the accused. The High Court

dismissed the setting aside application and the accused then refiled the constitutional questions directly to the High Court under s 84 of the CJA. That application was dismissed by the High Court and became the subject of appeal to the Court of Appeal. At para 30 of its decision the Court of Appeal found that the constitutional issues were not raised at the striking out application but were referred separately under s 30 of the CJA. The Court of Appeal held that since the accused there had filed an application under s 30 of the CJA, it was not procedurally proper for the accused to refile the application at the High Court.

[26] Thus reverting to the present application, this court found no objection to the applicant choosing not to file not an application under s 30 of the CJA but instead filing directly at the High Court the constitutional questions coupled with the prayers to set aside and quash the sessions court proceedings. Hence, this court did not find that the notice of motion is frivolous and an abuse of process of this court.

[27] Based on the reasons stated above, this court respectfully declined to take the same approach to s 30 of the CJA as taken by the High Court in *Mohd Fahmi Redza bin Mohd Zarin v Pendakwa Raya* referred to by learned deputy public prosecutor.

[28] The preliminary objections raised by the respondent was therefore rejected. Since this court is equipped with the jurisdiction to hear constitutional issues, this court decided to hear the constitutional questions and court not refer them to the Federal Court (see *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1; [2020] 3 CLJ 593).

MERITS OF THE APPLICATION — SUBMISSIONS BY PARTIES

By the applicant

[29] Based upon the learned counsel's oral and written submissions filed as contained in encls 16, 31, 37 and 39, the gist of the arguments for each of the grounds for the application are summarised as follows.

Issue of constitutionality of FOPA

[30] Learned counsel for the applicant contended that the FOPA is not constitutional premised on the arguments that: (a) art 149 of the FC empowers Parliament to promulgate only preventive detention legislation; (b) the FOPA does not contain any element of preventive detention; (c) the FOPA does not contain the safeguards provided under art 151 of the FC; and (d) the FOPA does not stop and prevent the commission of an offence by a suspected person.

[31] In support of those arguments learned counsel for the applicant referred to, inter alia:

(a) the extracts of the Reid Commission Report;

(b) Hansard for the FOPA Bill

(c) the common preventive detention features found in other legislations promulgated pursuant to art 149 of the FC such as the Internal Security Act 1960, Prevention of Crime Act 1959 and the Dangerous Drugs (Special Preventive Measures) Act 1985 are absent in the FOPA;

(d) the meaning of the words 'stop' and 'prevent' as found in art 149 of the FC;

(e) the decisions in *Che Ibrahim b Che Ismail v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [2001] MLJU 572; *A Chandra Segaran a/l Anggapan v Timbalan Menteri Dalam Negeri Malaysia* [2002] MLJU 101 on the meaning of those words; and

(f) decisions in *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1; *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] MLJU 668; [2021] 5 CLJ 581 and *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia* [2021] 6 MLJ 68; [2021] 8 CLJ 511 on the interpretation of art 149 of the FC.

Issue of legality of the FOPA charges and the s 32 proceedings

[32] It was also submitted that the prosecution of the applicant under the FOPA charges, the applicant's detention and the s 32 proceedings are tainted with mala fides based on the arguments:

(a) the FOPA charges were filed merely to ensure the continued incarceration of the applicant at the time when the applicant's detention under s 3(1) of the DDSPM was about to expire on 3 October 2020 and the applicant's alleged involvement in drug trafficking activities via 'Ops Eagle' and 'Ops Eagle Diamond' was not proven; and

(b) failure by the respondent to specifically rebut the applicant's various averments;

(c) by preferring the reference proceeding under s 32 of the FOPA and not applying for a forfeiture of the applicant's properties under s 8 since the applicant was a liable person under s 7(1) of the FOPA, the prosecution had unfairly avoided the burden of proving the legality of any forfeiture by placing the burden upon the applicant to prove that he was legally entitled to those seized properties failure of which the properties will be automatically forfeited;

(d) the FOPA charges were not in conformity with the Preamble to the FOPA and art 149 of the FC when the applicant was charged acting alone and not as part of a substantial body of persons;

(e) the FOPA charges failed to disclose any predicate offence; and

(f) the action to seize and maintain the seized properties said to be worth more than RM300m are not proportional to the value of drugs under the amended charge.

[33] In support of those arguments learned counsel referred to, inter alia, decisions in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara and other appeals* [2002] 4 MLJ 449; [2002] 4 CLJ 309; *State (Trimbole) v Governor of Mountjoy* [1985] (IR) 550; *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831; *Chew Wai Keong v Public Prosecutor* [2010] 6 MLJ 847; *Public Prosecutor v Kuala Dimensi Sdn Bhd* [2021] 2 MLJ 469; [2021] 3 CLJ 198and *Public Prosecutor v Billion Nova Sdn Bhd* [2016] MLJU 1823; [2016] 2 CLJ 763.

By the respondent

[34] Based on the respondent's oral arguments and written submissions in encls 25, 35, 41 and 46, the respondent's response to the applicant's contentions and arguments are summarised as follows.

Issue of constitutionality of the FOPA

[35] It was argued by learned deputy public prosecutor, inter alia: (a) art 149 of the FC merely empowers Parliament to enact laws to prevent and stop any of the actions listed in art 149(1)(a)–(1)(f) of the FC; (b) art 149 of the FC does not state that the laws to be promulgated must be laws that preventively detain suspected persons; (c) art 151 of the FC is only relevant to laws relating to preventive detention but not any other; and (d) the objective and purpose of FOPA serves to stop or prevent a suspected person from enjoying properties derived from drug related activities and therefore meets the objective of art 149 of the FC.

[36] In support of those arguments reference was made to the decisions in *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors*; *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293; [1988] 1 LNS 132; *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157; [1983] 1 CLJ 21; *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; [1978] 1 LNS 202; *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia* [2021] 6 MLJ 68; [2021] 8 CLJ 511 and *Dato' Menteri Othman Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus*

[1981] 1 MLJ 29; [1984] 1 CLJ Rep 98.

Issue of legality of the FOPA charges and the s 32 proceedings

[37] The respondent submitted that the issue of mala fides has no merits based on the arguments that:

(a) the issue was not specifically pleaded in encl 1;

(b) the issue of mala fides cannot be decided merely based on affidavits and written submissions of the applicant;

(c) the determination of mala fides is a finding of fact that can only be made upon evaluation of evidence to be presented at the trial in the sessions court proceedings;

(d) the Federal Court decision in *Selva Vinayagam Sures v Timbalan Menteri Dalam Negeri, Malaysia* [2021] 1 MLJ 601; [2021] 2 CLJ 29 on the issue whether the applicant acted alone or part of a substantial body of persons must be distinguished from the FOPA charges;

(e) there is no requirement under the FOPA to prove a predicate offence unlike forfeitures under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLFTA'); and

(f) the respondent had sufficiently rebutted in encl 5 all the averments made by the applicant.

[38] References were made to the decisions, inter alia: *Public Prosecutor v Sudesh Ratnarajah & Ors* [2021] 4 MLJ 607; [2021] 6 CLJ 333*Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors*; *Mohamad Ezam Mohd Noor v Ketua Polis Negara and other appeals; Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199; *Mohd Rafizi Ramli v Public Prosecutor* [2014] 3 MLJ 114; [2014] 4 CLJ 1; *Tan Hoo Eng v Public Prosecutor* [2019] 6 MLJ 471; [2019] 1 LNS 893 and *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 533; [2010] 8 CLJ 934.

DELIBERATIONS AND FINDINGS

On the issue of constitutionality of the FOPA

[39] After carefully considering all arguments on this issue, the cases referred to by both parties and upon this court's further reading of more recent decisions of the Federal Court touching on art 149 of the FC, more particularly the decisions in *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356; [2022] 5 CLJ 1; *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177, and

Selva Vinayagam Sures v Timbalan Menteri Dalam Negeri, Malaysia this court finds and holds the following views.

[40] The plain and literal reading of art 149 of the FC does not limit the powers of Parliament to promulgate laws other than those containing provisions on preventive detention for if such was the intention then the legislators would not have structured art 149 of the FC the way they did, that is, by making a broad reference to a provision of law designed to stop or prevent any of the actions listed in sub-art 149(1)(a)–(1)(f) without specifying the limits to the type of provision that can be passed.

[41] The fact that the language used was couched in such broad form gives the necessary breath and width to Parliament to pass any law having that effect, whether or not it relates to or contains provision for preventive detention (see Sheridan & Groves, *The Constitution of Malaysia* (*Malayan Law Journal* (5th Ed, 2004) at p 594). Since the fundamental liberties that art 149 of the FC permits to be compromised are not limited only to personal liberty under art 5 but also includes the right to not be deprived of property under art 13 of the FC, then to say that art 149 of the FC was meant to be employed in passing laws that only preventively detains a person, makes the inclusion of art 13 a purposeless exercise.

[42] Whilst the historical background to art 149 of the FC may be relevant in understanding its purpose and objectives yet that factor alone cannot control how art 149 of the FC should be interpreted. Its interpretation must be premised on what has been plainly provided for and what is plain is that art 149 of the FC did not in any uncertain terms provide that the laws that can be promulgated under it are limited only to preventive detention laws (see *Dato' Menteri Othman Baginda & Anor v Dato' Ombi Syed Alwi bin Syedldrus* and *Theresa Lim Chin Chin & Ors v Inspector General of Police*). In *Theresa Lim Chin Chin* the Supreme Court held:

> The next argument is that in view of art 149, the ISA should be limited to communist insurgencies alone. To support this proposition, we were invited to refer to paragraph 174 of the Reid Commission Report and to the speeches made by the late Prime Minister Tun Abdul Razak when moving the motion in Parliament to pass the Internal Security Bill. There had been some arguments as to whether or not it is proper for the court to advert to these documents. In our view, there is no hard and fast rule about this, and certainly the courts in this country, as well as the United Kingdom, admit such references but it is clear from the practice of the court that such reference is only to appreciate the legislative history of an Act, and it cannot be regarded as the basis or the determining factor for interpreting the Act or any provision of the Act. If we do that, the court will cease to be the ultimate interpreters of law because in the end what is law will be guided by what the politicians said in Parliament and indeed this has been asserted recently.

[43] In this courts view, preventive detention law or a law containing provisions on preventive detention is only a type of law that can be passed by Parliament inconsistent with arts 5, 9, 10 and 13 of the FC but not necessarily the only type of law. This court quotes Her Ladyship Nallini Patmanathan FCJ in *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors*:

> [12] It is untenable to utilise the extreme measures set out in legislation enacted pursuant to art 149 of the FC, to deal with criminal offences which are more properly dealt with under the Penal Code, and other relevant legislation. It is incorrect to turn to emergency legislation to deal with ordinary criminal offences in order to procure further evidence, or because there is insufficient evidence to prosecute a person under the relevant criminal legislation dealing with that particular crime.
>
> [13] This in turn is because legislation enacted pursuant to art 149 of the FC, such as POCA, permits for non-conformity of such legislation with selected articles in Part II of the FC dealing with fundamental liberties, due to the grave threat posed by such subversive action. *This includes non-compliance or inconsistency with arts 5, 9, 10 and 13 of the FC. Foremost amongst this* is the permitted incarceration of individuals without trial under art 5(1) of the FC. (Emphasis added.)

[44] In *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* the Federal Court stated:

> [151] A perusal and construction of art 149(1) of the FC reveals that the provision is made in the FC for special powers accorded to Parliament to legislate against subversion, organised violence and acts and crimes which are prejudicial to the public as well as emergency powers, which may well be inconsistent with some of the fundamental liberties safeguarded in arts 5, 9, 10 and 13 of the FC. It is therefore a special power that allows for, *inter alia, the preventive detention of persons* ... (Emphasis added.)

[45] Thus, any other type of law can be passed pursuant to art 149 of the FC without having any feature on preventive detention for as long as the trigger point under art 149 of the FC is satisfied that is, its preamble recites art 149(1) and any of the acts in (a)–(f) (see per Her Ladyship Zaleha Yusof FCJ in *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia* [2021] 6 MLJ 68; [2021] 8 CLJ 511). To borrow the terms used by His Lordship Augustine Paul FCJ in *Kosma Palm Oil Mills Sdn Bhd v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1, laws passed under art 149 of the FC are a genus of security laws whilst a preventive detention law is just a specie of such law.

[46] It follows then art 151 of the FC is only relevant where that specie of law is a preventive detention law. It has no application where the species of law satisfying the trigger point of art 149 of the FC does not have any feature of preventive detention. To read otherwise would amount to including another condition other than the trigger point for any law to be promulgated pursuant to art 149 of the FC. The shoulder note to art 151 of the FC and the words

'Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention ...' in art 151(1) of the FC must therefore mean what it says, that is art 151 of the only applies when the law provides for preventive detention and none other (see discussion of His Lordship Vernon Ong FCJ in *Selva Vinayagam*).

[47] Coming back to FOPA, following the above discussion FOPA is therefore just a specie of the genus of security laws apart from preventive detention promulgated pursuant to art 149 of the FC. FOPA met the trigger point qualification when its Preamble recites that action has been taken and further similar action is being threatened by a substantial body of persons both inside and outside Malaysia: (a) to organize and carry out trafficking in dangerous drugs, including their importation into and exportation from Malaysia; (b) to spread the dependence on dangerous drugs among various classes of people in Malaysia, thereby causing widespread detriment to public health, security, safety and morals; and (c) to acquire property by trafficking in dangerous drugs and to utilise property for such trafficking and whereas the action taken and threatened is prejudicial to public order in Malaysia.

[48] As opined by the Federal Court in *Datuk Seri Anwar Ibrahim*, it is Parliament as empowered by art 149 of the FC who decides on whether those actions that the FOPA seeks to prevent or stop has been taken or threatened. Since Parliament has determined, by reference to the Hansard records, that such actions have been taken or threatened then it is not for this court to question its truth. To go behind that would be crossing the wall that separates the Judiciary and the Legislative branch of the government.

[49] In further arguing against the constitutionality of FOPA, learned counsel for the applicant submitted that there is a question as to what FOPA actually stops or prevents since FOPA primarily deals with the subject matter of property related to drug offences and not the suspected offender. Since the suspected offender is not preventively detained to stop or prevent him from committing an offence then FOPA does not satisfy the very purpose of stopping and preventing actions taken by such persons as provided under art 149 of the FC.

[50] In response to this point, it must be first stated that in comparison to the five other laws passed pursuant to art 149 of the FC namely: (a) Internal Security Act 1960 (Act 82) ('the ISA') which has now been repealed; (b) Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) ('the DDSPM'); (c) Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA'); (d) Prevention of Terrorism Act 2015 (Act 769) ('the POTA'); and (e) Prevention of Crime Act 1959 (Act 297) ('the POCA') FOPA stands distinct in that its focus is not on preventive detention of an offender or

suspected offender but is on offences relating to property, the seizure and forfeiture of property connected with activity related to offences under FOPA, the Dangerous Drugs Act 1952, or any foreign law corresponding to these Acts or to the provisions of offences under these Acts, for assistance to foreign countries in relation to matters connected with dangerous drugs and all other matters related to them.

[51] Therefore, the meaning of the phrase 'to stop or prevent' in the context of FOPA must be guided by the objective of FOPA itself and cannot be interpreted within the same context of preventive detention as found under ISA, DDSPM, SOSMA, POTA and POCA and as discussed in the plethora of cases on preventive detention some of which was referred to by learned counsel for the applicant. Since FOPA's prime focus is against property and not the person then it is obvious that any discussion on the meaning and purpose of preventive detention would have no relevance to FOPA. As held by the Court of Appeal in *Jason Chan Huan Sen v Public Prosecutor* [2015] 1 MLJ 701; [2015] 2 CLJ 605:

> [81] ... To our mind, if one were to look at the long title of the FOP Act itself, it would become clear that the FOP Act was not just about forfeiting any property. What it does target is property that is ill-gotten, in contravention of the provisions under the FOP Act as well as the Dangerous Drugs Act 1952 and indeed provisions under corresponding foreign laws. In order to enable that forfeiture and the vesting of the seized property, the FOP Act was enacted under art 149 of the Federal Constitution, because otherwise that forfeiture and vesting would run afoul of art 13(2) of the Federal Constitution which provides that, 'No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[52] To narrowly define the meaning of 'to stop and prevent' within the context of preventive detention would deprive FOPA the benefit of the broad spectrum of preventive mechanisms it has and this could render impotent the enforcement agencies' continuous battle against drug trafficking crimes. In this respect this court refers to the decision of Mohd Zawawi Salleh J (as he then was) in *Amfinance Bhd v Public Prosecutor* [2010] 7 CLJ 607 where the act of stopping or preventing under FOPA was described as follows:

> [26] Mahkamah ini ingin menambah berhubung dengan tujuan Akta digubal oleh Parlimen. Akta ini telah digubal untuk digunakan sebagai 'law enforcement tool'. Perlucuthakkan harta telah terbukti sebagai salah satu alat penguatkuasaan undang-undang yang amat berkesan untuk membanteras kegiatan pengedar-pengedar dadah besar dan rangkaian kegiatan mereka. Kegagalan untuk melumpuhkan struktur ekonomi pengedar-pengedar dadah dan rangkaian kegiatan mereka akan menjejaskan keselamatan, kesihatan dan keamanan negara. Perlucuthakkan harta boleh menghalang cita-cita mereka yang didorong oleh tamak haloba untuk bergiat dalam aktiviti pengedaran dadah. Perlucuthakkan harta akan menafikan keuntungan yang diperolehi daripada jenayah pengedaran dadah yang diperlukan untuk membolehkan mereka meneruskan kegiatan haram

tersebut. Perlucuthakkan harta menyerang sasaran yang paling penting pengedar-pengedar dadah iaitu poket atau akaun bank mereka.

[53] This court agrees with that interpretation as reflecting what FOPA seeks to stop and prevent. To state in other words, the prevention relates to the economic resources and benefits used in and/or derived from drug related activities. The war against drugs trafficking involves not only the war against the people committing the acts but includes against all their economic tools and benefits. To be effective in combating drug trafficking, the perpetrators of drug crimes must be deprived of their means to carry out drug trafficking activities and they must also be denied the enjoyment of their ill-gotten gains. Keeping these economic tools and gains beyond the reach of these people would inhibit their ability to carry on their activities. Effectively, they will be stopped and prevented from funding and repeating their crime. This in inherent in the powers granted under FOPA which includes powers of arrest without warrant, seizure and forfeiture of property, power to intercept communication, powers to request and obtain information and powers to track property.

[54] This court would also refer to the Federal Court decision in *Public Prosecutor v Lau Kee Hoo* where although the Constitutionality of the ISA was not challenged, the Federal Court dismissed arguments that the death sentence imposed under the ISA was not constitutional since the ISA was passed as an act to stop and prevent subversive actions on the grounds, inter alia, that whilst the ISA was designed to stop and prevent subversive actions, it did not make ISA any less relevant and applicable as against completed act of crimes for which the accused can be charged. The prosecution of an accused equally amounted to stopping and preventing such actions. In this court's view, the reasoning of the Federal Court similarly applies to FOPA being a law made under art 149 of the FC. Although it does not stop and prevent a person from committing a crime, the prosecution of an accused under FOPA equally serves to stop and prevent drug related crimes. His Lordship Suffian LP stated:

> The ISA is legislation against subversion expressly authorized by art 149 of the Constitution. Mr Karpal Singh conceded that the Act was constitutional; that being so we cannot see how it can be said that the impugned section is invalid as being contrary to art 5(1); because the Article itself expressly provides that any provision of law enacted under the Article is valid 'notwithstanding that it is inconsistent with art 5.
>
> It was however argued that the law authorized by the Article must, as stated in the Article, be one 'designed to *stop* or *prevent* that action' meaning subversive action of the kind listed in cl (1) of the Article, that for instance a person might be subjected to *preventive* detention; that the action of which the respondent was accused had taken place, that therefore there was no question of preventing or stopping it, and that if at all he should be proceeded against not under the ISA but under other laws.

In our judgment there is no merit in this argument. True the ISA. is designed to stop or prevent subversive action, but as the whole of it is valid and is till in force it can be used as authority for prosecuting persons who have completed acts made criminal by the Act, not only for stopping or preventing such acts. In any event, what better way is there of preventing similar acts than by prosecuting offenders such as the respondent?

[55] Therefore, to conclude, this court answers each of the questions listed in Annexure A of encl 1 as follows:

(a) to the first question, this court holds that any law promulgated pursuant to art 149 of the FC must not necessarily be a legislation substantively and dominantly dealing with preventive detention;

(b) to the second question, this court holds that the Dangerous Drugs Act (Forfeiture of Property) 1988 is constitutional notwithstanding that it has no provision relating to preventive detention;

(c) to the third question, this court holds that the phrase 'to stop *or prevent*' in art 149 of the FC must be read in the context of the relevant law passed. In relation to FOPA, that phrase essentially carries the meaning to stop or prevent drug related crimes by seizing and forfeiting illegal property used in the commission of or derived from such crimes. Article 151 of the FC has no relevance where the law passed does not contain provisions on preventive detention; and

(d) to the fourth question, since each of the question has been answered affirmatively in favor of the constitutionality of FOPA, there is no effect on the applicant and the sessions courts proceedings as far as the constitutionality of the law under which he faces action is concerned.

On the issue of mala fides and abuse of process of court

[56] Since this court has decided that the FOPA is constitutional it now falls to be decided the other issues raised by the applicant. Firstly, whether the FOPA charges are tainted with mala fides and abuse of process of court warranting an intervention by this court. The applicant's complaint of mala fides against the prosecution rests on the accumulation of the following matters: (a) the proffering of the amended charge against him with no acknowledgment by the Police that no dangerous drugs were found under Ops 'Eagle Diamond' and 'Eagle' which otherwise could be linked to him; (b) his detention under the DDSPM despite him being charged for possession of a very small amount of drugs; (c) the seizure of his, his wife's and his companies' assets which are disproportionate to the value of drugs under the amended charge; (d) in relation to that the proffering of the FOPA charges; (e) deprivation of his liberty; and (f) the use of s 32 proceedings.

[57] After considering the arguments and cases referred to by both parties, this court finds that whilst on the face of the narrative presented by the applicant there seems to be reasons for concern on the proportionality of the actions taken against the applicant weighed against the small amount of drug the applicant was charged for possessing under the amended charge, these matters cannot be summarily determined merely based on affidavits. This court takes judicial notice that any major operations or arrests involving drug trafficking offences will invariably, in most cases, involve the use of intelligence resources (domestic and international) and coordination between not only the various branches of the police but also between different enforcement agencies. There is a presumption under s 114(e) of the Evidence Act 1950 actions taken by public authorities are made within the law. Therefore, there is a presumption that in charging the applicant initially under the first charge and then under the amended charge, his detention and then charging him under the FOPA charges, the authorities have acted regularly in accordance with the law. There is also a presumption that the decision of the prosecution in filing the charges against the applicant is legal and constitutional (see *Sundra Rajoo a/l Nadarah v Menteri Luar Negeri, Malaysia*).

[58] The burden is on the applicant to overcome that presumption and to show that there was mala fides (see *Mohamad Ezam Mohd Noor v Ketua Polis Negara*). Whether or not the FOPA charges were made by the prosecution in cohorts with the police authorities merely to deprive the applicant of his liberty and not premised on a bona fides act of enforcing the law can only be determined through examination of witnesses. The legal conundrum that the applicant has found himself in is not plain and obvious like in an application for habeas corpus arising from a detention under POCA, for example, where the legality of a person's detention can be determined through the inspection of the regularity of detention procedures.

[59] As stated earlier, major drug trafficking raid operations by the police invariably involve intelligence resources, not just domestic but also international, that are not usually made known to the public and for that reason it is not always evident why the police and the relevant authorities may take certain form of actions and why some persons are just subjected to preventive detention and some others are charged. It may appear mala fides to the detainee or accused person but it may be very well justified to the police to take certain actions based on those intelligence resources, analysis, deduction and evidence. However, that is not saying mala fides cannot have been present in the applicant's case or any case. Where the accused such as the applicant believes that he is a victim of mala fides or selective prosecution with an extraneous purpose then it is incumbent upon the applicant to adduce compelling evidence and that can only be done at the trial of the FOPA charges.

[60] What has been presented to this court by the applicant in all his affidavits are his understanding, interpretation and suspicion of what has transpired. They may serve as evidence of certain factual developments but do they serve as prima facie and compelling proof of bad faith as required by the Federal Court in *Sundra Rajoo a/l Nadarah v Menteri Luar Negeri, Malaysia*? In *Sundra Rajoo* the allegation of mala fides was premised on the illegality of the charge which the prosecution there should have known that it was not legally possible due to the factor of immunity the complainant enjoyed. Thus, the considerations of facts there are quite straightforward and therefore distinguishable from the circumstances before this court. In this court's view all averments made by the applicant do not in themselves amount to prima facie and compelling evidence of any mala fides that justifies a quashing and setting aside of the sessions courts proceedings.

[61] For that reason this court finds that the respondent's denials in encls 5 and 9 are sufficient under the circumstances to dispute the applicant's claims of mala fides. Even if there were no specific rebuttals on specific allegations made by the applicant, this court takes the view that such allegations cannot amount to evidence. The allegations are subject to proof through credible evidence which must be presented at the trials of the amended charge, FOPA charges and s 32 proceedings.

[62] On that score, this court does not find that the allegation of extortion on the applicant in the amount of RM30m allegedly made by some police officers on behalf of certain unnamed senior officials and the delays by the police in concluding its investigation on the matter must necessarily lend credence to the applicant's claims of mala fides. Ultimately, the central question to be determined is whether the FOPA charges are founded on evidence or not and whether they were just used as a tool to keep the applicant behind bars without any cogent and credible evidence to support the amended charge and FOPA charges in the first place. That answer can only be determined at the trial. As decided by the Court of Appeal in *Ahmad Zubair Hj Murshid v Public Prosecutor* [2014] 1 MLJ 624; [2014] 1 CLJ 697:

> [10] ... The prosecution is entitled to produce these documents during the trial through its relevant witnesses in order to unravel the case for the prosecution in its proper context. The prosecution is entitled to explain through its relevant witnesses, within the limits of the relevant provisions of the Evidence Act 1950, how these documents came into existence and how these documents fit into the prosecution's case. When the case for the prosecution is concluded, after the prosecution has examined its witnesses, who may in turn be cross-examined and if necessary re-examined, only then the court shall consider based on the entire evidence whether the prosecution has made out a prima facie case against the appellant. For the proper determination of the issues raised by learned counsel, it must be pointed out that the trial against the appellant in the sessions court is regulated by s 173 of the CPC. Evidence could be led to establish the case of the prosecution on a prima

facie basis and subsequently beyond reasonable doubt. Since the appellant had pleaded not guilty to the charges, in accordance with s 173(c) of the CPC, the sessions court shall proceed to take all such evidence as may be produced in support of the prosecution.

[63] In *Tan Hoo Eng v Public Prosecutor* [2019] 6 MLJ 471; [2019] 1 LNS 893 the Court of Appeal was presented with, inter alia, the issue that there had been selective and mala fides prosecution of the appellant by the prosecution and that had infringed the appellant's rights under art 5 of the FC. In dismissing the appellant's argument on that issue the court held:

> [32] The issues raised by the appellant are in relation to incomplete or biased investigation by the investigating officer, the delay in preferring charges against the appellant, the alleged suppression of facts by the prosecution and mala fide prosecution by the police and the Attorney General. These according to the appellant infringed art 5 of the Federal Constitution.
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> [33] We failed to see how all these issues (assuming that it is true) infringed her right under art 5 of the Federal Constitution. To date there has been no determination on the charges preferred against the appellant. The prosecution is still at its infant stage of proving a prima facie. The prosecution will have to adduce evidence in proving the elements of the charges. The appellant is not deprived of the right to cross examine the prosecution witnesses, including the investigating officer. If it is true that the investigation is shoddy or incomplete that resulted in the framing of the charges against the appellant, surely these will manifest at the end of the prima facie case. For the appellant to allege that there has been incomplete investigation by the investigating officer now which warrants the charges against her to be struck out (when the full evidence of the case has yet to be heard) is premature.
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> [34] On the allegation of selective prosecution whereby the appellant has been a victim, if that is true, will show in the course of the trial through the evidence. The prosecution has a duty to prove in the course of the trial all the elements of the charges against the appellant before an impartial judge who will preside over the case according to the rule of evidence and procedure. Again, as we have said before in the preceding paragraphs, for the court to decide now to struck out the charges and order an acquittal and discharge is prejudging the case before all the evidence are tendered, which no court of law is empowered to do.

[64] For that reason, this court does not agree that the case of *State (Trimbole) v Governer of Mountjoy* [1985] (IR) 550 which was heavily relied on by learned counsel for the applicant stood supportive of the applicant's case. In this court's view the action taken there was with a clear objective of detaining the complainant pending his extradition. The connection between the action and the objective was clear. But in the present case, the connection between the action to charge the applicant under the amended charge and FOPA charges and the objective to merely keep the applicant detained indefinitely and wrongfully is not patently clear. Once the FOPA charges are filed the prosecution have put themselves under a legal duty to prove such charges

through evidence as required by law. They cannot charge the applicant, have him locked behind bars, throw away the keys, leave the charges hanging and forget about him. The prosecution is duty bound by law to prove the charges for if no further action is taken then the trial court has the power to discharge and acquit the applicant of all the charges. The process must therefore be allowed to take place to its completion, either way.

Whether the FOPA charges are a nullity because they failed to state that the applicant is part of a substantial body of person in committing the alleged offences

[65] In dealing with this point, it would be necessary to first make a basic distinction between the facts in *Selva Vinayagam* and the present application. In the former, the matter that arose was with regards to the legality of the detention of the applicant under s 6(1) of DDSPM. Section 6(1) of the DDSPM is a provision on preventive detention. In that case the Federal Court held that the detention was illegal as the Minister had failed to address his mind to the question whether the applicant had acted alone or was he part of a substantial body of persons. The Federal Court held that notwithstanding that s 6(1) was silent on that requirement, the Preamble to the DDSPM had to be read into s 6(1) since the DDSPM was promulgated pursuant to art 149 of the FC, thus making it obligatory for the Minister to state that the applicant had acted as part of a substantial body of persons before making the order of detention.

[66] On a general observation, it would appear that based on the principle of stare decisis this court is bound by the decision in *Selva Vinayagam* which was affirmed by a different panel of the Federal Court in *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia* to take a similar approach in interpreting the Preamble and s 4(1) of the FOPA. This means that in charging an accused under s 4(1) of the FOPA it is a condition that the Preamble must be read into s 4(1) of the FOPA and it follows that it would be incumbent upon the prosecution to allege in the charge that accused had committed the offence as part of a substantial body of persons.

[67] This is where a practical legal difficulty arises. Under s 6(1) of the DDSPM, the detainee is not charged with an offence and there is no proof of conviction. What is required is just grounds for believing that the detainee was involved in drug related activities and that it was believed that he carried out those activities as part of a substantial body of persons. On the other hand, under s 4(1) of the FOPA a person is charged for an alleged offence of dealing with, or using, holding, receiving or concealing illegal property. Thus, like any other charge proffered against an accused under the law, the prosecution has the legal burden to prove each of the ingredients of the offence in order to prove a prima facie case. Even when a prima facie case is established, an accused

cannot be found guilty until a finding is made by the trial court that he had failed in raising any reasonable doubt on the prosecution's case.

[68] Therefore as far as the issue under consideration is concerned, the question that must be answered is whether it is an ingredient of an offence under s 4(1) of the FOPA that the applicant must have committed the offence as part of a substantial body of persons consistent with the Preamble of the FOPA.

[69] In answering this question, it must be observed that the Federal Court in *Selva Vinayagam* did not go further to state that in requiring the Minister to state that the detainee acted as part of a substantial body of persons, that substantial body of persons must be identified or named either collectively or individually. What is required is just the Minister's belief that the detainee had acted as part of a substantial body of persons that being the trigger point under art 149 of the FC.

[70] Additionally, it would have been quite onerous or even impossible for the Minister to undertake that exercise for reasons that are not difficult to fathom. In this court's view those reasons could be any of the following: (a) those body of persons are incapable of being accurately identified as it is known that suspected criminals are not always identified by their full or real names; (b) the difficulty in proving association between individuals making up that substantial body of persons although intelligence resources indicate otherwise; (c) the possibility that those body of persons operate under guises of legitimate commercial entities; or (d) that the disclosure of such names may lead to exposure of identities of individuals who are actually agents of enforcement agencies working undercover. This court takes judicial notice that enforcement agencies more often than not build their investigations over time based on fragmented information, leads, intelligence resources, suspicions, theories and many man hours of analysis before arriving at any conclusion. For strategic reasons a suspect may not be charged but just preventively detained to aid enforcement agencies in their work or to detach him from suspected network of criminals because the investigations into the criminal networks continue to be work in progress. Thus, to make that disclosure a condition would invariably frustrate the very objective and purpose of the DDSPM which Parliament had endorsed when it passed the Act and the authorities would be deprived of the mechanism provided by law in combating drug crimes.

[71] Coming back to that question, for the reasons discussed above this court holds the view that it cannot be an ingredient of an offence under s 4(1) of the FOPA that an accused had acted as part of a substantial body of persons because such ingredient will be subject to proof and to proof that fact would

simply be too onerous on the prosecution and ultimately no one can practically be charged under that law. To state that the Preamble of the FOPA must be read into s 4(1) thus making it an ingredient of the offence will result in a legal quagmire that cannot have been intended by the legislators. The manner s 4(1) of the FOPA was drafted shows that the offence is not predicated on a fact that the accused had committed the offence whilst being part of a body of substantial body of persons. In any event s 4(1) does not preclude that possibility as s 4(1) states that the offence could have been committed either on behalf of the accused himself or on behalf of others. It also does not preclude s 4(1) from being read together with ss 34 (common intention), 107 (abetment) and 102A (criminal conspiracy) of the Penal Code if the evidence shows that the offence was committed with some other identified individuals.

[72] For those reasons, this court agrees with the argument put forth by learned deputy public prosecutor that the decision in *Selva Vinayagam* must be distinguished on the main consideration that the law considered in that case and the law in the present application are different in nature, one being on preventive detention and the other on establishing a criminal offence. Each legal provision results in different legal consequences and therefore cannot be equally considered on the same basis. The view held in *Selva Vinayagam* that the Preamble must be read into the operative provision of s 6(1) of the DDSPM must therefore, respectfully, be confined to that case and its likes only.

[73] As an observation, it is interesting to note the view of the courts in *Mohamad Ibrahim Kamarudin v Timbalan Menteri Dalam Negeri dan lain lain* [2018] MLJU 67; [2018] 1 LNS 59 and *Ahmad Yani bin Ismail v Inspektor General of Police & Ors* [2005] 4 MLJ 636; [2004] 1 LNS 224 that it is not a requirement under the DDSPM and ISA that before a person can be detained it must be shown that the detainee was part of a substantial body of persons. Although the Federal Court in *Selva Vinayagam* had considered the decision in *Ahmad Yani* and overruled it on the basis that it was made prior to the amendment to s 15 of the Interpretations Acts 1948 and 1967 which did not include reference to the long title and preamble to an Act in aiding the interpretation of a provision, the case of *Mohamad Ibrahim* which was decided much later after *Ahmad Yani* but was not considered by the Federal Court deserves some attention. In this court's view, notwithstanding that the decision in *Ahmad Yani* was overruled and that *Mohamad Ibrahim* had referred to it, the amended s 15 of the Interpretation Act 1967 was brought to the attention of the court in *Mohamad Ibrahim*.

Failure to prove the predicate offence under the FOPA charges

[74] With regards to this issue, this court finds that there is a very fundamental difference between the actions brought under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLFTA') and s 4(1) of the FOPA.

[75] The cases of *Public Prosecutor v Kuala Dimensi Sdn Bhd* and *Public Prosecutor v Billion Nova Sdn Bhd* involved the action of forfeiture of property under s 56(1) of the AMLFTA and it was held there that in order to sustain an application for forfeiture the applicant had to first prove that there was a predicate offence committed involving the property under question. Therefore, the primary action in those cases were for the forfeiture of property. By comparison, the action under s 4(1) of the FOPA is the prosecution of an offence of dealing with, or using, holding, receiving or concealing illegal property. In proving the offence, it would be incumbent upon the prosecution to prove that the property that is the subject matter of the charge is illegal property as defined under s 2 of the FOPA. The status of property is one of the ingredients that the prosecution must prove to make up the offence. It is not a precondition to filing a charge under s 4(1) of the FOPA.

[76] Therefore, it would be inaccurate to state that the FOPA charges are a nullity because they do not disclose the predicate offence. The proof of a criminal offence beyond a reasonable doubt cannot stand on the same footing as proving a predicate offence for a civil forfeiture action under s 56(1) of the AMLFTA which is on a balance of probabilities. The proof a criminal offence involves proving the ingredients of the offence through credible evidence the trial. To demand that the prosecution prove first that the seized properties are illegal before the FOPA charges can be instituted is to separate and subject the proof of the ingredients of the offence at different stages of the criminal proceedings, that is one before the charge is proffered and the other ingredients at the trial. That cannot be a correct proposition of the law in drafting a charge and proving the elements of an offence. To suggest that is to confuse the difference between those two types of proceedings.

That the seizure of the properties are disproportionate to the offence under s 12(2) of the DDA

[77] It was further argued by learned counsel for the applicant that the seizure of the seized properties as disproportionate to the amended charge as the estimated value of the applicant's properties are far in excess of the value of merely 2.66g of methamphetamine. Reliance was made on this court's decision in *Public Prosecutor v Multi Electrical Supply & Services* [2022] 10 MLJ 369; [2022] 5 CLJ 113 where this court had discussed the principle of proportionality of forfeiture to the predicate offence committed.

[78] Now, it must be stated that the consideration of the principle of proportionality of forfeiture arises only after the predicate offence is proven (as under AMLFTA) or following conviction of an offence. A full reading of the cases referred to by this court in that case will prove that point. The consideration of the principle of proportionality do not arise at the stage when the property in question is seized pending disposal of the related proceedings.

[79] Therefore, it is premature to raise the issue of proportionality at this stage when the amended charge, FOPA charges and s 32 proceedings are still pending. The issue can be raised by the applicant in those proceedings at the appropriate time.

Legality of s 32 proceedings

[80] After carefully reading the entirety of ss 7 and 8 of the FOPA, it is clear that there is a bar under s 7(3) against the institution of proceedings under Part III of the FOPA where there is still a pending proceeding against the liable person in any court in Malaysia for an offence under ss 3 or 4 of the FOPA.

[81] Since the FOPA charges are still pending then the applicant squarely falls within the scope of s 7(3) of the FOPA. Although the applicant was a liable person because of his detention, events had superseded that detention when the applicant was charged with the FOPA charges. As a result of that, the applicant's position as a liable person under s 7(1) had changed from one who was just detained to one who is facing prosecution proceedings under the FOPA charges which are still pending.

[82] For that reason this court does not agree there had been a selective persecution by the prosecution and an abuse of process of court when the applicant's claim was referred to the sessions court under s 32. The fact that the claim was referred by the prosecution to the sessions court implies that the property is not illegal (see *Hong Leong Bank Bhd v Public Prosecutor* [2009] 3 MLJ 546; [2009] 8 CLJ 463).

[83] The applicant will have all the opportunity to prove on the balance of probabilities that the seized properties: (a) are not the subject of the commission of any offence under the Dangerous Drugs (Forfeiture of Property) Act 1988 or the Dangerous Drugs Act 1952; and (b) are not illegal property. The applicant and the other daimants will also be able to show evidence that they are lawfully entitled to the seized properties. As decided by the Court of Appeal in *Jason Chan Huan Sen & Ors v Public Prosecutor* [2015] 1 MLJ 701; [2015] 2 CLJ 605 (CA), for the sessions court to arrive at a decision that no offence under FOPA or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed; and that such property

is not illegal property, such facts must come from the investigation officer in charge of the case as the two matters would be within his full knowledge and he must assist the sessions court judge in the determination of the same. The applicant will have ample opportunity to cross examine the investigation officer and prove his allegations of mala fides by the police and the prosecution in seizing his properties and that any forfeiture of his returned to the rightful owners under para 6 of the application is hereby dismissed.

Application for stay of s 32 proceedings

[84] After this court delivered its decision, learned counsel for the applicant informed this court that an appeal will be filed to the Court of Appeal. For that reason, learned counsel sought a further stay of the s 32 proceedings on the grounds that in the event the seized properties are forfeited and the applicant eventually succeeds in his appeal, the applicant would have suffered irreparable loss.

[85] The respondent did not object to the application. Thus, an order is made that the s 32 proceedings are further stayed until disposal of the appeal.

Order accordingly.

Reported by Ahmad Ismail